SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-896

WORTHEN BANK & TRUST COMPANY, N. A.
Petitioner,

vs.

NATIONAL BANKAMERICARD INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Reply of Respondent to Brief of the State of Arkansas as Amicus Curiae

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The *amicus* brief of the Attorney General of Arkansas misapprehends the nature of the case presented by Worthen's petition to this Court. Like Worthen, the *amicus* brief assumes facts contrary to those established by the affidavits of NBI and by the stipulations of the parties. Thus, the first, third and fourth points made at pages 2-4, discussing the application of the *per se* rule, assume that NBI's bylaw is the concerted action of businessmen, each horizontally competing with the others in the production of a national bank credit card.[1] This is contrary to

1. See particularly *amicus'* summary of its conception of the facts at page 16 in its discussion of the *Sealy* and *Topco* cases. (*United States v. Sealy, Inc.* (1967) 388 U.S. 350; *United States v. Topco Associates* (1972) 405 U.S. 596.

the established and admitted fact that a national bank credit card can be produced *only* by the joint, cooperative action of the owner-members of NBI.[2] The *amicus* brief queries the significance of this fact (p. 15). But the answer is obvious. In such a situation a bylaw requiring the undivided loyalty of each joint venturer to the enterprise cannot constitute a "group boycott." This is illustrated by the *Investment Bankers Case* discussed in our Brief in Opposition.[3] There the court held that the joining together of a group of investment bankers for the purpose of underwriting an issue of securities, at an agreed price and on agreed terms, did not violate the antitrust laws. This, for the reason that the bankers (ordinarily and otherwise competitors) had joined in a unitary, cooperative venture *necessary* to underwrite the issue, and, when so acting, were not competitors in *that* enterprise. From this it followed:

> "'Having [legally] combined, it was proper for each quasi-partner to agree not to cut his other partners' throat'" (118 F.Supp. 689).

Bylaw 2.16 permits Worthen to be an agent bank (a non-participant in ownership and management) in both systems if it wishes. Or it can select Master Charge over NBI and become a member-owner of Master Charge. All bylaw 2.16 says is that if Worthen wishes to remain a joint venturer

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2. In distinguishing the *Topco* case, the court below expressed it thus (Appx. to Pet., A-17, f.n. 7):

> "• • • the Topco arrangement provided its members with certain economies which they could not otherwise achieve except by association. But we agree with the Justice Department that '[T]he "product" represented by a national credit card requires cooperative relationships among the member banks of a kind not encountered in the sale of products by individual supermarket chains.' *Indeed in this case association is required before the 'product' can exist.*" (italics by the court)

3. *United States v. Morgan* (S.D.N.Y. 1953) 118 F.Supp. 621. See our Brief in Opposition, pp. 11-12.

in the NBI system and participate in its management and become privy to all of its competitive innovations, with the fiduciary obligations attaching to such a status, it cannot at the same time become a member of NBI's principal competitor.

Further, quite apart from the unitary aspects of NBI's operation, the facts which must be accepted as true on the present record negate any possibility of holding NBI's bylaw *per se* invalid. Among these are: That NBI acted in good faith and for legitimate business reasons, including the desire to preserve competition between the two national credit card systems, when it passed the bylaw; that the bylaw in fact promotes competition between the two systems, and without the bylaw competition between the systems will be lessened and ultimately eliminated by merger; that the purpose of Worthen's challenge to the bylaw is to acquire a monopoly in the bank card industry in Arkansas (Appx. to Pet., pp. A-9—A-10). No decision of this Court has ever held or suggested that a bylaw adopted for this purpose and having this result constitutes a *per se* violation of the antitrust laws.[4] Neither section

4. See the review by the court below of the pertinent decisions of this Court. Appx. to Pet., pp. A-15—A-19. Among other things the court said (Appx. to Pet., p. A-16):

> "In each of these cases there was a lack of an economic justification, in terms of the need to join together to produce the product being sold. In this case, as conceded by Worthen, it would be impossible for any of the member banks, acting alone, to issue a national bank credit card. It can only be done by a nationwide combination of banks. The facts that in this case there is an economic justification for the existence of NBI in terms of productive capacity, and inferentially a justification for preserving the integrity of that productive capacity, together with the fact that in the cited cases there was a lack of any redeeming virtue, leads us to the conclusion that these cases are not controlling here."

2.16 nor any other provision of NBI's bylaws allocates territories, fixes prices or excludes competitors. Instead, the bylaw enforces well-established fiduciary obligations of joint venturers not to take action destructive of the venture in which they are engaged.[5]

The second, fifth and sixth points in the *amicus* brief (pp. 3-6) express concern that the decision of the court below will inhibit the development and growth of bank card systems in Arkansas to the detriment of Arkansas consumers. This industry, *amicus* says, "should be permitted to develop in free competition," (p. 3). But here again the *amicus* brief sweeps aside the facts established by NBI. These demonstrate that "free competition" will be furthered by the NBI bylaw and would be defeated were Worthen to prevail on its claims that dual membership in both competing systems is required by the anti-

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5. The decisions are clear that every concerted action or joint refusal to deal is not necessarily a "group boycott" and a *per se* violation of the antitrust laws. For example, *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Man. Com.* (5 Cir. 1972) 467 F.2d 178, involved a refusal by a group of airlines to publish certain of plaintiff's tours in a tour guide manual published by the airlines. The refusal was based upon plaintiff's failure to comply with a rule adopted by the airlines requiring that travel bureaus obtain the permission of the hotels involved before publishing the tours in the tour guide manual. Reversing a holding of the district court that the concerted refusal of the airlines to list the tours was a *per se* violation of the antitrust laws, the Fifth Circuit reviewed the authorities and held (467 F.2d 187):

> "In all of these cases, the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question. • • • We conclude that resort to the *per se* rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a 'naked restraint of trade.' Absent these factors, the rule of reason must be followed in determining the legality of the arrangement."

The facts established in the preliminary record in the case at bar demonstrate no anticompetitive motive or effect but, on the contrary, a motive and effect of preserving competition and implementing the legitimate business interests of NBI.

trust laws. Worthen's stipulation was specific that the challenged bylaw will prevent the total elimination of competition at the system level by a merger of the only two national bank card systems, and that Worthen's purpose in challenging the bylaw is to obtain a monopoly in the bank card industry in Arkansas.

The *amicus* brief concludes with the suggestion that this Court should grant certiorari at this stage of the case "because of the uncertainty the Court of Appeals opinion injects into the heretofore clearly emerging pattern of per se rules under Section 1 of the Sherman Act" (p. 16). The opinion of the court below injects no uncertainty; it simply holds that before any rule of law can be applied the facts must be known.

CONCLUSION

For the foregoing reasons, and for those stated in our Brief in Opposition, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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